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INTEREST OF THE *AMICI CURIAE*

The *amici curiae* State of Connecticut and the States identified on the cover (the "Amici States"), by and through their attorneys general, respectfully submit this brief in support of the Respondents-Cross Petitioners and urge this Court to affirm the judgment below.

This case presents two exceptionally timely and important questions: (1) whether States may, consistent with the Constitution, enact campaign finance reforms that impose mandatory limits on the amount that candidates for state office may spend on their election campaigns; and (2) whether States will continue to have the ability to enact contribution limits, which have become a mainstay of state campaign finance reform efforts, to prevent corruption and the appearance of corruption in the electoral process.

The Amici States have a vital interest in the resolution of these issues because they will directly impact their ability, and the ability of all States, to enact critically needed campaign finance reforms. Since 1976, when this Court struck down campaign spending limits in *Buckley v. Valeo*, 424 U.S. 1 (1976), the Amici States have seen an astronomical increase in campaign spending by political candidates that has fueled a generally held public perception that money buys power. The States have further found that the intense pressure to raise funds greatly reduces the time that elected officeholders have available to serve the public and that electoral competition is diminishing because running for office has become a financial impossibility for an ever-increasing number of Americans.

To combat these extremely serious problems, which threaten to undermine the integrity of the democratic process at all levels of government nationwide and are getting worse by the day, it is essential that the Amici States, and all States, have the ability, if they so choose, to

enact campaign finance reforms such as Vermont's that include both contribution limits and expenditure limits. As the "laboratories of democracy," the States' ability to experiment in this regard is crucial if viable solutions to this national crisis are ultimately to be found. Accordingly, the Amici States have a vital interest in ensuring that the constitutionality of Vermont's legislation is upheld and may serve as a model for similar campaign finance reform efforts in other States.

SUMMARY OF ARGUMENT

In 1997, in response to deep public concern that unlimited fundraising and campaign spending was undermining the integrity of Vermont's electoral system, the Vermont legislature adopted the 1997 Vermont Campaign Finance Reform Act ("Act 64" or "the Act"), codified at 17 V.S.A. §§ 2801 – 2883 (2005). The Act constitutes a comprehensive reform of the State's campaign finance laws and includes limits both on the amount that a single source, political committee, or political party may contribute to a candidate for state office, and on the amounts that such candidates may spend on their campaigns. 17 V.S.A. §§ 2805, 2805a.

Vermont found that comprehensive campaign finance reform was essential because the skyrocketing costs of campaigning for elective office, fueled by an "arms-race" mentality in which candidates felt compelled to raise ever-increasing amounts of money to avoid being outspent by their opponents, had reduced public confidence and involvement in the electoral process, increased the appearance that candidates and elected officials would not act in the best interests of Vermont citizens, caused candidates and elected officials to spend inordinate amounts of time fundraising, resulted in candidates and elected officials responding and giving access to large contributors over small contributors and non-contributors,

and rendered running for public office a financial impossibility for many Vermonters. 1997 Vt. Laws P.A. 64. Concluding that it had compelling state interests in addressing these concerns, Vermont adopted Act 64.

Although the present lawsuit focuses on Act 64 and the record of Vermont's specific experience, it is vitally important to recognize that the deep-seated problems that threaten the integrity of Vermont's electoral process, and led to the adoption of Act 64, are by no means unique to Vermont. On the contrary, they plague virtually every State in the country and are seriously eroding public confidence in representative government nationwide.

Although the States have tried myriad reforms, they have not, to date, succeeded in controlling effectively the rampant corruption, extraordinary fundraising pressure, or loss of equal opportunity for political participation caused by limitless campaign spending. Expenditure limits, however, hold particular promise as a means of addressing these concerns. While each State must assess for itself whether expenditure limits will serve its unique needs, it is essential that the States have the choice. Numerous States are actively pursuing reforms that include such limits and public support for such measures is extraordinarily high. Given the urgent need to restore public confidence in the integrity of our democratic process, the Amici States urge this Court to affirm the judgment of the Second Circuit upholding the constitutionality of expenditure limits and permit States nationwide to experiment with these critically-needed reforms.

Although expenditure limits are a key component of Act 64, the Act also imposes contributions limits. Unlike expenditure limits, which have been largely unused since *Buckley* due to uncertainty over their constitutionality, contribution limits have become well-established tools in the States' efforts to eliminate corruption and the appearance of corruption in the electoral process. Although

the petitioners would have this Court abandon its well-established precedents upholding the constitutionality of contribution limits, and thereby threaten both existing limits in other States and the ability of all States to adopt such limits in the future, nothing warrants such drastic revision of the law. On the contrary, this Court should affirm the constitutionality of contribution limits in general, and Vermont's in particular, recognizing that it is the legislature, not the judiciary, that is best suited to determine in each case the precise limit that will best promote the States' interest in preventing corruption and the appearance of corruption in the electoral process.

ARGUMENT

I. THE ABILITY TO EXPERIMENT WITH EXPENDITURE LIMITS IS VITALLY IMPORTANT TO THE STATES, ALL OF WHICH FACE THE SAME THREATS TO THE INTEGRITY OF THE DEMOCRATIC PROCESS AS VERMONT.

In adopting Act 64's expenditure limits,[1] Vermont sought to address multiple, serious problems threatening the integrity of its electoral system, including: (1) the corruption and appearance of corruption that result when candidates become beholden to financial constituencies capable of generating large combined contributions to the candidates' campaigns; (2) the inability of candidates and officeholders to interact with voters and perform their

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[1] Act 64 limits expenditures by candidates for the following offices to the following amounts: governor - $300,000; lieutenant governor - $100,000; other state-wide office - $45,000; state senator - $4,000 to $16,000 (depending on the number of senators in the district); county office - $4,000; state representative, multiple-seat district - $3,000; and state representative, single-seat district - $2,000. 17 V.S.A. § 2805a. In 2005, the legislature amended the law to provide for increases in these limits according to the Consumer Price Index in each election cycle beginning in July, 2005.

official duties because of the inordinate amounts of time that they are required to spend fundraising; and (3) the loss of equal participation in the electoral process that results when citizens are financially unable to run for office. Although the evidence in this case focuses on Vermont's experience, seemingly daily accounts across the country of government scandals, corruption probes, influence-peddling by elected officials, special interest lobbyists wining and dining with candidates at one multi-million dollar fundraiser after another, entrenched incumbents running unopposed, and abysmal voter turnouts have made all too clear that Vermont's experience is indicative of a national crisis.

A. Since *Buckley*, There Has Been A Dramatic Escalation In The Cost Of Campaigning For Elective Office.

In the thirty years since *Buckley*, the costs of running for elective office, whether at the national, state, or local level, have increased astronomically. According to statistics compiled by the Center for Responsive Politics, the money spent by presidential and congressional candidates in the 2004 federal elections totaled a record-breaking $4 billion. Center for Responsive Politics, *Campaign Finance Reform* (Jan. 19, 2005)(available at www.opensecrets.org/ news/ campaignfinance/index.asp). This astounding figure represents a 30% increase over the $3 billion spent only four years earlier in the 2000 federal elections. *Id.* Whereas the average winning Senate campaign cost $610,000 in 1976, Wertheimer and Manes, *Campaign Finance Reform: A Key to Restoring the Health of our Democracy*, 94 Colum. L. Rev. 1126, 1132 (1994), by 2004 the average cost had risen to $7.84 million, with the top spender pouring more than $28 million into his campaign. Center for Responsive Politics, *Election Overview* (available at www.opensecrets.org/overview/ topspend.asp?cycle=2004); Mark C. Alexander, *Let Them*

Do Their Jobs: The Compelling Government Interest In Protecting The Time Of Candidates And Elected Officials, Loyola University Chicago Law Journal, Vol. 37, note 9 (to be published in April, 2006)(available at http://papers.ssrn.com/so13/papers.cfm?abstractid =816244). In the 2004 presidential campaign, President George W. Bush spent $345 million, up from $185 million four years earlier, making the 2004 presidential election the most expensive campaign in history. Center for Responsive Politics, *Election Overview* (available at www.opensecrets.org/overview/topraces.asp).

In state elections, the increases are equally alarming. For example, in the 54 gubernatorial elections held between 1977 and 1980, the total expenditures, expressed in 2004 dollars, were $507.8 million. Thad Beyle, *Governors: Elections, Campaign Costs and Powers*, pp. 197-198, The Book of the States (2005 ed.). Just over two decades later, in the 53 gubernatorial elections held between 2000 and 2003, the total expenditures in 2004 dollars had skyrocketed to $1,148 million -- an increase of 126%. *Id.* In the only two gubernatorial races in 2005 -- in Virginia and New Jersey – the candidates smashed all previous spending records for a governor's race in both states by more than 33 and 100 percent respectively. Bob Lewis, *Kilgore's $22 Million Busts Fundraising Record*, Associated Press (Oct. 31, 2005) (available at www.vpap.org/vpa/AP11012005.htm); David Chen and David Kocieniewski, *As Multimillionaires Duel, Corzine Outspends Forrester*, The New York Times (Nov. 5, 2005)(available at www.nytimes.com/2005/11/05/nyregion/metrocampaigns/05finance.html). In New Jersey, the record expenditures were attributed in part to the fact that both candidates were multimillionaires who had eschewed the State's public financing system and poured millions of dollars of their personal funds into their campaigns. *Id.*

Such limitless expenditures are fueled by the fact that the candidate who spends the most money generally wins. For example, in the 2004 congressional primaries, 91% of the candidates who raised the most money won their races. U.S. PIRG Education Fund, *The Wealth Primary: The Role of Big Money in the 2004 Congressional Primaries*, p. 8 (Oct. 2004)(available at www.uspirg.org/reports/WealthPrimary2004.pdf). Of the 11,400 candidates who ran in general-election contests for state legislative seats in 2003-2004, 85% of the winning candidates raised the most money in their races. The Institute on Money in State Politics, *State Elections Overview 2004*, p. 3 (Dec. 2005) (available at www.followthemoney.org/press/Reports/200601041.pdf). And in the 2004 gubernatorial races, 66% of the biggest spenders won. *Id.* at 6. Given the high correlation between outspending one's opponent and winning, there is no reason to believe that the pressure to spend ever-increasing amounts to attain elected office will lessen in the absence of significant reforms to the current system of campaign financing.

B. All States Have A Compelling Interest In Deterring The Corruption And The Appearance Of Corruption In Elective Politics And Government That Is Caused By Unlimited Campaign Expenditures.

Based on almost six months of hearings and testimony from 145 witnesses, the Vermont legislature found that "[l]arge contributions and large expenditures by persons or committees . . . reduce public confidence in the electoral process and increase the appearance that candidates and elected officials will not act in the best interests of Vermont citizens." 1997 Vt. Laws Pub. Act 64 (H. 28)(finding (a)(9)). This loss of public confidence in the electoral system results when candidates and elected officials, faced with a limited number of campaign contributors and a constant fear of being outspent, become

dependant on special interest groups that can generate large combined contributions. Concerned that they cannot oppose these groups without being cut off from needed funds, the candidates and elected officials set their agendas and make decisions based on the desires of the special interests to whom they are beholden, rather than on the needs of the citizens whom they represent. The result is that "citizens are less willing to believe that the political system represents the electorate, exacerbating cynicism and weakening the legitimacy of government power." *Landell v. Sorrell*, 382 F.3d 91, 119 (2d. Cir. 2004). Given evidence that "[e]ven with contribution limits, the arms race mentality has made candidates beholden to financial constituencies that contribute to them, and candidates must give them special attention because the contributors will pay for their campaigns," *id.* at 119 (emphasis omitted), the Second Circuit appropriately concluded that "Vermont has a compelling interest in safeguarding its political process from such contributor dominance, because it corrupts the process for achieving accessibility and accountability of state officials and candidates." *Id.* at 118.

The same is true across all States and all political affiliations. States are finding, as Vermont has, that candidates and elected officials have become dependant on special interest groups that can generate large combined contributions and that official decision-making with regard to everything from state contracts and investments to state employee hiring and promotions is all too often influenced by campaign contributions.

In Connecticut, such corruption was rampant in the administration of former Governor John Rowland, resulting in Rowland's resignation as Governor on July 1, 2004 under threat of impeachment for illegally doling out millions of dollars in state contracts to companies and individuals who had, among other favors, contributed significantly to his election campaigns. One such

contributor, the Tomasso construction group, marshaled over $435,000 in contributions from family members, associated companies and subcontractors to Governor Rowland's two re-election campaigns and state and national political party accounts. Common Cause, *The Rowland Corruption Trail Begins On The Campaign Trail*, p. 1, Jan. 20, 2004 (available at http://ccag.net/Democracy/final%20cc%20tomasso%20report.pdf). Included in the Tomassos' contributions were significant donations by TBI Construction, which began contributing heavily to Rowland's re-election campaign in 1998. *Id.* at 4-5. In the following four years, the Rowland administration awarded TBI three major no-bid state contracts worth more than $125 million, appointed the company's president to a juvenile justice state advisory panel, despite a seeming lack of qualifications or experience, and seated the company's executives with the Governor and his wife at social functions. *Id.* at 5. In short, the company's contributions bought access, influence and favoritism.[2]

Similar "pay-to-play" corruption infected the office of former Connecticut State Treasurer Paul Silvester, who is currently serving a federal prison term for misusing his authority over Connecticut's $20 billion pension fund to generate millions of dollars in kickbacks and campaign contributions. Edmund Mahoney, *Silvester to Spend 28 More Months In Jail*, Hartford Courant, p. A1, Nov. 21, 2003; Associated Press, *Rowland Campaign Benefited*

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[2] The same was true of numerous other major Rowland contributors. For example, after energy giant Enron and its associates began contributing regularly to Governor Rowland's election campaigns, three Enron executives secured a private meeting with the governor and ultimately obtained the equivalent of a $220 million unsecured loan from the State. Alison Leigh Cowan, *The Garbage and the Governor: Enron in Impeachment Inquiry*, New York Times, section A, p. 1 (March 16, 2004); *see also* Connecticut Common Cause, *The Gift That Keeps Giving: Campaign Contributors Benefited From Tax Breaks* (April 12, 2005)(available at www.commoncause.org/atf/cf/{FB3C17E2-CDDI-4DF6-92BE-BD4429893665}/KeyAir-Sousa%201.pdf).

From Treasurer Contacts, Jan. 18, 2000. Among other tactics, Mr. Silvester demanded that firms seeking lucrative state contracts to manage state pension investments contribute hundreds of thousands of dollars to his own campaign and that of Governor Rowland. *Id.*; Edmund Mahoney, *State Treasurer Scandal Finally Comes To Trial*, Hartford Courant, p. A1, June 13, 2003.

A similar ongoing scandal in Ohio, dubbed "Coingate," centers around Thomas Noe, a rare coin dealer and political fundraiser who has contributed more than $200,000 over the past fifteen years to prominent state and federal elected officials. Using his contributions to gain influence, Mr. Noe won highly coveted gubernatorial appointments to the Ohio Board of Regents and the Ohio Turnpike Commission, before garnering an unprecedented $50 million investment of state money in his rare coin fund by the Ohio Bureau of Workers' Compensation. James Drew and Steve Eder, *Voinovich Appointment Started Noe's Rise*, Toledo Blade (Sept. 4, 2005)(available at www.toledoblade.com/apps/pbcs.dll/article?AID=20050904/SRRAECOINS/309040001). Soon after receiving the investment, Mr. Noe began transferring large sums to his personal accounts and making thousands of dollars in political contributions to the governor, state auditor and other top elected officials. Steve Eder and James Drew, *Noe Transferred Coin Cash Before Giving To Politicians*, Toledo Blade (Oct. 9, 2005)(available at www.toledoblade.com/apps/pbcs.dll/article?AID=/20051009/SRRARECOINS/310090001); James Drew and Steve Eder, *Petro: Noe Stole Millions*, Toledo Blade (July 22, 2005)(available at www.toledoblade.com/apps/pbcs.dll/article?AID=/20050722/SRRARECOINS/50722004). State and federal investigations subsequently revealed that $13 million out of the $50 million investment in the coin fund was missing and unaccounted for, *id.*, and that Mr. Noe was laundering money, using 24 individual "donors," to whom he gave cash, as conduits to funnel over $45,000 into a presidential

campaign. Mike Wilkinson and James Drew, *Noe Indicted: GOP Backer Accused Of Laundering Cash*, Toledo Blade (Oct. 28, 2005) (available at www.toledoblade.com/apps/pbcs.dll/article?AID = /20051028/SRRARECOINS/310280002). Summing up the situation, an Ohio teacher railed that "[p]ay-to-play politics not only exists, it's out of control. . . .Wealthy people have special access to politicians that I don't have. I can't play because I can't pay." Jim Provance, *Vote Reform Helps Stall Ohio Spending Cap*, Toledo Blade (August 10, 2005).

The public has voiced similar outrage over official corruption in Tennessee, where a recent investigation revealed that two-thirds of the Tennessee Highway Patrol officers tapped for promotion under Governor Phil Bredesen contributed to his campaign or had family members or political patrons who did. Brad Schrade, *Troopers With 'Politics' Win Out On Promotions*, The Tennessean (Nov. 13, 2005)(available at www.tennessean.com/apps/pbcs.dll/article?AID = /20051113/NEWS0201/511130390). Among those with such connections, over half were promoted over troopers who scored better on impartial exams or rankings. *Id.* Campaign donors who were not troopers were rewarded in other ways, such as by being given photo identification cards that appeared identical to those held by Tennessee Highway Patrol officers. Trent Seibert and Brad Schrade, *Trooper-like Badges, IDs Go To Well-Connected*, The Tennessean (August 7, 2005)(available at www.tennessean.com/apps/pbcs.dll/article?AID = /20050807/NEWS0201/508070403). To the average citizen, the cards sent a clear message that there was a different set of rules for the well-connected, who could brandish the cards to obtain official favors and avoid being arrested. *Id.*

While such corruption and apparent corruption is horrifying in itself, what is particularly alarming is that it has become so common and has fueled a generally held

public perception that money buys power and that those with power do not represent those without money. In 1997, almost half of all Americans believed the influence of money in politics seriously undermined democratic ideals by leading elected officials to vote against their constituents' interests and support policies they did not personally believe were best for the country. Center for Responsive Politics, *A National Survey of the Public's Views on How Money Impacts our Political System*, conducted by the Princeton Survey Research Associates (June 1997)(available at www.opensecrets.org/ pubs/survey /top.htm).

More recent surveys suggest that such cynicism is growing. *See, e.g.*, The Study Commission on Public Funding of Campaigns in Maryland, *Marylanders' Opinions of Campaign Finance and Campaign Finance Reform*, Dec. 2002 (available at www.capc.umd.edu/ rpts/MDCamp FinSrvy.pdf)(among Maryland voters, 92% believe that campaign contributions influence the policies supported by state elected officials and 83% believe that contributors have greater access to elected officials than those who do not contribute); Zogby International, *Views of Connecticut Voters On Public Financing Legislation*, p. 4 (May, 2005) (available at www.commoncause.org/atf/cf {FB3C17E2-CDDI-4DF6-92BE-BD4429893665}/zogby% 20poll.pdf) (62% of Connecticut voters believe that elected officials in their state are more concerned with the needs of those who pay for their campaigns than with the needs of those who do not); Pew Research Center poll (Feb. 2004) (available at www.publicagenda.org/issues/pcc_detail.cfm ?issue_type=campaign_finance&list=3)(59% of Americans are "very much" bothered by the amount of money that candidates spend on campaigns); Pew Research Center poll (August, 2003)(available at www.publicagenda.org/issues/ pcc_detail.cfm?issue_type = campaign_finance&list = 12) (59% of Americans believe that most officials do not care what they think); CBS News poll (Jan. 2001)(available at

www. public agenda. org/ issues/ pcc. cfm?issue_type= campaign_finance)(70% of Americans think that public officials make or change policy decisions as a direct result of money that they receive from major campaign contributors).

Because "the avoidance of the appearance of improper influence is . . . critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent," *Buckley*, 424 U.S. at 27 (internal quotation marks omitted), it is essential that States have the means to prevent such influence through reforms that curb the arms race mentality and diminish candidates' dependence on large contributions from special interests.

C. All States Have A Compelling Interest In Enabling Elected Officials To Spend Less Time Fundraising And More Time Serving The Public.

The Amici States also share Vermont's compelling interest in curbing the staggering costs of campaigning in order to permit officeholders to spend less time fundraising and more time interacting with voters and performing official duties.

The Second Circuit concluded that the evidence in Vermont was "clear that the pressure to raise large sums of money greatly affects the way candidates and elected officials spend their time." *Landell*, 382 F.3d at 122. In particular, the unrelenting need to raise funds compels officials to spend time fundraising and meeting with donors rather than attending to their official duties, *id.* at 122-123, and to respond and give access to contributors who make large contributions in preference to those who make small contributions or no contributions. *Id.* at 122 n. 16; 1997 Vt. Laws P.A. 64 (H. 28)(finding (a)(2)).

This time problem afflicts elected state and local officials nationwide. *See Rosenstiel v. Rodriquez*, 101 F.3d

1544,1553 (8th Cir.1996), *cert. denied*, 520 U.S. 1229 (1997)(recognizing Minnesota's compelling interest in reducing the time candidates spend fundraising, thereby increasing the time available for discussion of the issues); *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 39 (1st Cir. 1993)(recognizing Rhode Island's valid interest in freeing candidates from the pressures of fundraising); Alaska Stat. § 15.30.160(1); Ariz. Rev. Stat. § 16-940(B)(8)("[t]he people of Arizona find that our current election-financing system . . . [r]equires that elected officials spend too much of their time raising funds rather than representing the public").

In Connecticut, complaints about the massive amounts of time that must be devoted to fundraising have been a common refrain among legislators pushing for campaign finance reform throughout the past decade.[3] In 1997, Representative Bysiewicz (now Connecticut's Secretary of State) explained that not only were the costs of running for state office spiraling out of control, but:

> [w]e also have the problem of . . . candidates spending too much time raising money. Conventional wisdom says that it costs about $3 million to run for governor. What does that mean? That means $29,000 a week for two years or $4,200 a day for two years. And that means that what you end up [with] is candidates who have to spend all their time raising money and they don't have any time to raise issues. And for those candidates who are incumbents they will be

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[3] In December, 2005, Connecticut enacted a campaign finance reform law that provides for public financing and is a vital step towards correcting the problems plaguing Connecticut's electoral process. 2005 Conn. Pub. Acts No. 05-5 (October 25, 2005 Special Session). As noted below in section E, however, voluntary public financing systems have not solved the time problem.

> spending lots of time raising money and have less time to do the people's business.

40 Conn. H. R. Proc., pt. 8, 1997 Sess. 2707 (May 14, 1997).

Unfortunately, the situation is not improving. In pressing for reform, former Connecticut gubernatorial candidate William Curry lamented that "every hour that we spend calling big contributors that we don't spend learning about the real problems in the real lives that people face every day is an hour lost to democracy as far as I'm concerned." Conn. Joint Committee Hearing, Government Administration and Elections Committee, p. 538 (March 11, 2002)(remarks of William Curry). Another Connecticut legislator has summed up the problems as follows:

> [E]veryone can acknowledge that the influence and the time taken in the preoccupation with fund raising is time taken away from what should be our preoccupation with issues, and debate, talking to our constituents, debating with each other the issues, and indeed campaigning hard. Yet, in race after race, campaign after campaign, we have seen more and more pressure put on each and every one of us to *raise funds* and then *raise funds* and then *raise funds* and then *raise funds*.

43 Conn. S. Proc., pt. 4, 2000 Sess. 1021-1022 (April 12, 2000)(remarks of Senator Sullivan)(emphasis added). The result of such relentless pressure is that, across the country, "all too often [legislators] become fund-raisers first, and legislators second." 138 Cong. Rec. § 115 (daily ed. Jan. 6,1987)(statement of Sen. Byrd).

D. The States Have A Compelling Interest In Ensuring That All Citizens Have An Equal Opportunity To Participate In The Political Process.

A third consequence of the intense pressure on candidates to outspend their opponents, which the Second Circuit did not reach in Vermont's case, but which poses equally as great a threat to the integrity of the electoral process as corruption and time consumption, is the loss of equal opportunity for citizens to participate in the electoral process.

Democracy is premised on the belief that all citizens should have an equal voice in government. As a result, this Court has consistently struck down barriers to equal participation of voters and candidates alike. *See Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966)(striking down poll taxes); *Bullock v. Carter*, 405 U.S. 134 (1972)(striking down candidate filing fees); *Lubin v. Panish*, 415 U.S. 709 (1974)(striking down candidate filing fee). Yet, despite this ideal, unlimited campaign spending has made running for office a financial impossibility for most individuals, not just in Vermont, but across the country. *See* 1997 Vt. Laws P.A. 64 (H. 28)(finding (a)(1)); Alaska Stat. § 15.30.160(3)("[t]he people of the State of Alaska hereby find and declare as follows: . . . entrenched incumbency has discouraged qualified citizens from seeking office and has led to a lack of competitiveness and a decline in robust debate on issues of importance to the people of Alaska"); Ariz. Rev. Stat. § 16-940(B)(7)("[t]he people of Arizona find that our current election-financing system: . . . [d]rives up the cost of running for state office, discouraging otherwise qualified candidates who lack personal wealth or access to special interest funding"); Colo. Rev. Stat. § 1-45-102 ("[t]he people of the state of Colorado hereby find and declare that . . . the rising costs of campaigning for political office prevent qualified citizens

from running for political office"); Neb. Rev. Stat. § 32-1602(1)("[t]he Legislature [of Nebraska] finds that the cost of running for statewide office and legislative seats has risen greatly and that many qualified candidates are excluded from the democratic system as a result of such rising cost"); R.I. Gen. Laws § 17-25-18 ("the general assembly [of Rhode Island] finds that the need to raise ever larger sums of money to effectively compete for general office threatens the essence of our democratic system by excluding many well qualified candidates").

In particular, the need for ever-increasing campaign funding means that millionaire candidates are increasingly common. In the 108th Congress, for example, 42% of senators and 25% of representatives were millionaires, compared with less than 1% of the citizenry at large. U.S. PIRG Education Fund, *Look Who's Not Coming To Washington*, p. 6 (Jan. 2005)(available at http://uspirg.org/reports/lookwhos2005.pdf). In the 38 gubernatorial races in 2002, 21 candidates contributed $1 million or more to their own campaigns. The Institute on Money in State Politics, *State Elections Overview 2002*, p. 6 (Nov. 2004)(available at www.followthemoney.org/press/Reports/200411181.pdf). It has been found that "millionaire candidates distort the electoral process and make it considerably more difficult for ordinary citizens to run for office because the level of funds needed to compete with millionaires is beyond the reach of most candidates." Derek Cressman, U.S. PIRG Education Fund Report, *Lone Star Election Laws*, § II (July, 2000)(available at http://pirg.org/democracy/democracy.asp?id2=5977&id3=CFR&).

Would-be candidates lack the funds not only to compete with millionaires, but also to compete with incumbents. Incumbent candidates generally have far greater access to campaign funds than their challengers and have enormous financial war chests that discourage new faces from even attempting to run for office. The result is

that, in many cases, incumbents face no competition at all. *See* U.S. PIRG Education Fund, *The Wealth Primary: The Role of Big Money in the 2004 Congressional Primaries*, p. 4 (Oct. 2004)(finding that 65% of the 2004 congressional primary races were uncontested).

Unlimited campaign spending, which permits millionaire and incumbent candidates to spend as much as they can raise, reduces the number of people willing to run and, as a result, limits voters' choices. As one scholar has observed, the result is that "unlimited spending, rather than protecting speech, may actually reduce both the amount and the diversity of electoral speech that voters hear." Richard Briffault, *Special Series on Election Law: The Return of Spending Limits: Campaign Finance After Landell v. Sorrell*, 32 Fordham Urb. L. J. 399, 434 (May 2005). Accordingly, States have a compelling interest in limiting campaign expenditures in order to preserve the right of citizens to participate equally in the electoral process that is crucial to democratic government.

E. Expenditure Limits Have The Potential To Solve The Deep-Seated Problems Caused By Unlimited Campaign Spending.

Although States have experimented with a wide variety of campaign finance reforms, the reforms to date have not solved the problems of corruption, time loss, and diminished opportunity to participate in the electoral process that result from the ever-increasing costs of campaigning.

In particular, contribution limits alone have not been sufficient. As the Second Circuit observed in Vermont's case, contribution limits have not solved the corruption problem because "[e]ven with contribution limits, the arms race mentality has made candidates beholden to financial constituencies that contribute to them." *Landell*, 382 F.3d at 119.

Public financing systems, in which candidates receive public funding if they agree to abide by spending caps, are likewise unable to remedy the problems caused by runaway campaign spending because such systems, to date, have allowed candidates to opt out. *See* Mark C. Alexander, *Let Them Do Their Jobs: The Compelling Government Interest In Protecting The Time Of Candidates And Elected Officials*, Loyola University Chicago Law Journal, Vol. 37, § III.B (to be published in April, 2006)(available at http://papers.ssrn.com/so13/papers.cfm?abstractid=816244) Vincent Blasi, *Free Speech And The Widening Gyre Of Fund-Raising: Why Campaign Spending Limits May Not Violate The First Amendment After All*, 94 Colum. L. Rev. 1281, 1317-1318 (May, 1994). Under such systems, candidates with extensive personal wealth or a particular ability to raise funds beyond those that would be provided through public financing tend to forego public funds and seek to outspend their opponents because outspending one's opponent is typically the key to winning. This was the case in the 2005 gubernatorial race in New Jersey between Senator Corzine and Mr. Forrester. Both candidates were millionaires, who opted out of available state public financing in order to be free to spend unlimited amounts of money on their campaigns. Similarly, both major party presidential candidates in the 2004 primary opted to forego available public financing. As one scholar has accurately observed, "[t]he inability to force compliance is the gaping hole in the efficacy of public financing." *Id.*

Whereas contributions limits and public financing have failed to end the corruption, endless fundraising, and lack of equal participation spawned by ever-increasing campaign costs, expenditure limits have the potential to address all of these problems. In particular, expenditure limits eliminate the possibility of being vastly outspent that leads to the "arms race" mentality among candidates and elected officials. *Landell*, 382 F.3d at 127. According to

Vermont legislators and officials who testified in the present case, limits that prevented them from being outspent would increase their willingness to take positions that their contributors opposed. *Id.* at 127. In other words, if they are not going to be outspent, legislators are less likely to become beholden to the special interests that are so vital to their ability to raise limitless funds.

Similarly, capping expenditures reduces the time that candidates must spend fundraising, thereby freeing them to perform the work that they were elected to do. It also frees them, if they so choose, to engage in core First Amendment activities, such as delivering speeches and debating issues. As one study has pointed out, when spending is unlimited, "[a]ll too often, frontrunners will simply refuse to debate [their] opponent[s], preferring instead to raise campaign funds and buy commercials." Derek Cressman, U.S. PIRG Education Fund Report, *Lone Star Election Laws*, § II (July, 2000)(available at http://pirg.org/ democracy/democracy.asp?id2=5977&id3= CFR&). With spending limits in place, "time freed from fund-raising creates new opportunities for speech – among representatives, for example, or by a candidate to ordinary citizens." Vincent Blasi, *Free Speech And The Widening Gyre Of Fund-Raising: Why Campaign Spending Limits May Not Violate The First Amendment After All*, 94 Colum. L. Rev. 1281, 1324 (May, 1994). Thus, spending limits not only free candidates from the time pressures of fundraising, but also provide further opportunity for political speech.

Expenditure limitations also reduce the threat to equal participation posed by millionaires and incumbents with access to vastly greater resources than the average citizen. By placing a ceiling on the amount that candidates can spend, expenditure limits make running for office less financially daunting for the average person and thereby promote electoral participation by encouraging more citizens to run. Voters benefit not only because they have

greater choice among candidates, but also because elected officials are forced to be more accountable to their needs, knowing that voters have a choice. The result is a more representative government.

Given the tremendous potential for expenditure limitations to control the influence of money on the electoral process, state and municipal legislators across the country are actively considering reform measures that include such limitations. *See, e.g.*, Massachusetts H.B. 118, 184th General Court (Mass. 2005)(available at http://www.mass.gov/legis/bills/house/ht00/ht00118.htm) (proposing limits on campaign expenditures for all general, special, and primary elections for state office); North Carolina H.B. 1533, General Assem., 2005-2006 Sess. (N.C. 2005) (available at http://www.ncga.state.nc.us/ Sessions/2005/ Bills/ House/HTML/H1533v0.html)(proposing mandatory expenditure limits on campaigns for the council of state and general assembly); Oregon H.B. 3270, 73rd Or. Legis. Assembly, Reg. Sess. (Or. 2005)(available at http://landru.leg.state.or.us/05reg/measures/hb3200.dir/hb3270.intro. html) (proposing limits on a candidate's expenditure of his or her own funds in an election campaign).

Moreover, public support for campaign expenditure limits is extraordinarily high. A recent poll shows that a remarkable 87% of voters nationwide would support laws limiting campaign expenditures. Lake Research Partners, Public Opinion on Election Campaign Spending, p. 8 (Dec. 2005)(available at http://www.demos.org/pubs/Voter Survey_010406.pdf). Significantly, such support is extremely strong and consistent across all regions of the country (ranging from 84% support in the South to 91% in the Northeast), all political parties (84% support among Republicans, 89% support among Independents, and 90% support among Democrats), and all major demographic groups (84% support among men, 90% support among women, 88% support among those under age fifty, 86%

support among those over age fifty, 87% support among non-college graduates, 88% support among college graduates, 89% support among whites, 83% support among non-whites, 87% support among those with household incomes under $50,000, and 89% support among with household incomes over $50,000). *Id.* at pp. 9-11.

When asked about the effect that expenditure limits would have on the electoral process, 76% of those polled believed that the fairness of elections would improve, 70% stated that the potential for corruption and undue influence by special interests would decrease, 84% stated that elected officials would spend more time on their official duties and candidates would spend more time talking with voters, and 82% said that citizens would be more able to run for office. *Id.* at 12-15. Overall, 82% of voters felt that if laws incorporating expenditure limits were adopted, they would have more faith in the integrity of the election process. *Id.* at 15.

In sum, public interest in, and support for, expenditure limits is enormous nationwide. Given the great potential for such limitations to be invaluable tools in controlling the influence of money in electoral campaigns, the broad interest of States across the country in experimenting with such limits, and, as the respondents have shown, the lack of constitutional barriers, it is imperative that this Court uphold the constitutionality of Act 64 and open the door for similar legislation nationwide.

II. CONTRIBUTION LIMITS PLAY A KEY ROLE IN THE STATES' EFFORTS TO PROTECT THEIR ELECTORAL PROCESSES FROM CORRUPTION AND THE APPEARANCE OF CORRUPTION.

In fashioning Act 64, the Vermont legislature did not rely on expenditure limits alone. Instead, it concluded that limits on contributions to candidates from individuals, PACs, political parties, and any other single source were an

essential component of its comprehensive effort to address the myriad problems caused by unlimited campaign spending. 17 V.S.A. § 2805(a). The limits that Vermont adopted, which apply per election cycle, range from $200 on contributions to candidates for state representative or local office, to $400 on contributions to candidates for statewide office. *Id.* Citing this Court's well-established precedents, the Second Circuit appropriately upheld these limits, concluding that Vermont's interest in eliminating actual and apparent corruption was sufficiently important to support the limits and they were not so low as to prevent effective campaigning. *Landell*, 382 F.3d at 137-139.

The petitioners seek to reverse this ruling, arguing, among other claims, that Vermont failed to prove the existence of sufficient actual corruption or to demonstrate that its limits were no lower than necessary to address that corruption. Such arguments not only fly in the face of this Court's well-settled precedents governing contribution limits, but also, if adopted, would drastically curtail the States' ability to enact such limits and threaten existing limits with endless legal challenges. Given the critical importance of contribution limits to the States' efforts to prevent corruption and the appearance of corruption in the electoral process, such a result would be an enormous step backwards, effectively opening the door to even more corruption than currently exists.

A. Contribution Limits Are Valuable Tools In The States' Efforts To Battle Corruption And The Appearance Of Corruption.

Since *Buckley*, this Court has repeatedly and consistently upheld the constitutionality of contribution limits, recognizing that such limits involve "little direct restraint" on political communication because they permit "the symbolic expression of support evidenced by a contribution," but leave the contributor free to discuss

candidates and issues. *Buckley*, 424 U.S. at 20-21; *Nixon v. Shrink Missouri*, 528 U.S. 377, 386-387 (2000); *McConnell v. Federal Election Commission*, 540 U.S. 93, 135 (2003). Because such limits entail "only a marginal restriction upon the contributor's ability to engage in free communication," *Shrink Missouri*, 528 U.S. at 386, they need only be "closely drawn to match a sufficiently important interest." *Id.* at 387-388 (internal quotation marks omitted).

In so holding, this Court has recognized that "the prevention of corruption or its appearance constitutes a sufficiently important interest to justify political contribution limits." *McConnell*, 540 U.S. at 143. Significantly, and contrary to the petitioners' claim, this Court has "not limited that interest to the elimination of cash-for-votes exchanges" or "quid-pro-quo arrangements," *id.*, but rather has clearly extended it to "curbing 'undue influence on an officeholder's judgment, and the appearance of such influence.'" *Id.* at 150, quoting *Colorado II*, 533 U.S. at 441.

This Court has also rejected the petitioners' contention that to justify contribution limits based on its interest in preventing corruption and the appearance of corruption, a government must produce significant evidence of actual corruption. Instead, this Court has ruled that the level of proof required to sustain legislative judgments will vary with the "novelty and plausibility of the justification raised," *Shrink Missouri*, 528 U.S. at 391, and has recognized that it is "neither novel nor implausible" that large contributions could corrupt or raise suspicions of corruption. *Id.*; *McConnell*, 540 U.S at 144.

Finally, this Court has made clear that a contribution limit is not unconstitutional merely because a higher limit might work equally well. *Buckley*, 424 U.S. at 30. As long as a contribution limit permits a candidate to "amas[s] the resources necessary for effective advocacy," *id.* at 21; *Shrink Missouri*, 528 U.S. at 397, "a court has no

scalpel to probe whether . . . a $2,000 ceiling might not serve as well as $1,000." *Buckley*, 424 U.S. at 30.

Based on these rulings, contribution limits have become a mainstay of state campaign finance reform efforts. Although such limits have proved incapable in themselves of solving the multiple, deep-seated problems discussed in Section I, *supra*, they nonetheless serve a vital role in the States' efforts to protect the integrity of the electoral process. In particular, States have found that contribution limits further their compelling interest in preventing the corruption and appearance of corruption that is inherent in a system of large contributions by inhibiting the ability of wealthy interests to exert improper influence over legislative and executive policies. In addition, by requiring candidates to raise smaller sums from a larger group of contributors, contribution limits force candidates to seek broader popular support than they would if contributions were unlimited, and prevent them from simply selling themselves to the highest, most potentially corrupting bidder. Indeed, the benefits of contributions limits are so well-accepted that 45 States currently impose them in one form or another. National Conference of State Legislatures, *Contribution Limits* (2005)(available at www.ncsl.org/ programs/legman/about/ContribLimits.htm).[4]

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[4] *See, e.g.*, Alaska Stat. § 15.13.070; Ariz. Rev. Stat. Ann. § 16-905; Ark. Code Ann. § 7-6-203; Cal. Gov. Code § 85301; Colo. Rev. Stat. § 1-45-103.7; Conn. Gen. Stat. § 9-333m; 15 Del. Code § 8010; Fla. Stat. § 106.08; Ga. Code § 21-5-41; Haw. Rev. Stat. § 11-204; Idaho Code § 67-6610A; Kan. Stat. Ann. § 25-4153; Ky. Rev. Stat. § 121.150; La. Rev. Stat. Ann. § 18:1505.2; Md. Ann. Code art. EL, § 13-226; Mass. Ann. Laws, ch. 55, § 7A; Me. Rev. Stat. Ann. tit. 21-A § 1015; Mich. Comp. Laws § 169.252; Minn. Stat. § 10A.27; Mo. Ann. Stat. § 130.032; Mont. Code Ann. § 13-37-216; Nev. Const. art. 2, § 10; N.H. Rev. Stat. Ann. § 664:4; N.J. Stat. § 19:44A-11.3; NY Elec. Law § 14-114; N.C. Gen. Stat. § 163-278.13; Ohio Rev. Code § 3517.102; Okla. Stat., tit. 74, Chap. 62, Appx., 257:10-1-2; R.I. Gen. Laws § 17-25-10.1; S.C. Code Ann. § 8-13-1314; S.D. Codified Laws § 12-25-1.1; Tenn. Code

B. The Evidentiary Requirements Advocated By The Petitioners, If Adopted By The Court, Would Render It Virtually Impossible – For States To Enact Contribution Limits And Cause Existing Limits To Become Mired In Legal Challenges.

In asking this Court to require States to produce evidence of actual corruption that is directly correlated with contributions just above the States' established limits, despite this Court's previous, express rejection of such a requirement, *Buckley*, 424 U.S. at 30, *Shrink Missouri*, 528 U.S at 391-392, 397, the petitioners seek to impose an impossible burden on the States that would threaten their continued ability to adopt contribution limits. As this Court recognized in *Buckley*, "the scope of [actual corruption] can never be reliably ascertained." *Buckley*, 424 U.S. at 27. Not only is it inherently difficult to prove the existence of corruption or to quantify its degree, but any requirement that the States meet the test advocated by the petitioners "would inevitably lead to endless court battles over the sufficiency of the 'evidence' marshaled by the State." *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986).

Such a stringent evidentiary requirement would also force "a State's political system [to] sustain some level of damage before the legislature could take corrective action." *Munro*, 479 U.S. at 196. This approach would be senseless, given the widespread acknowledgment of the actual and perceived corruption associated with large contributions. Instead, as this Court held in *Munro*, a State should be permitted to respond to potential electoral deficiencies "with foresight rather than reactively," provided its

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Ann. § 2-10-302; Tex. Elec. Code § 253.155; Vt. Stat. Ann. tit. 17 § 2805; Wash. Rev. Code § 42.17.640; W. Va. Code § 3-8-12; Wis. Stat. § 11.26; Wyo. Stat. § 22-25-102.

response is reasonable and does not significantly impinge on constitutionally protected rights. *Id.* at 195-196. As a general rule, the Court will not "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." *Federal Election Commission v. National Right to Work Committee*, 459 U.S. 195, 210 (1982). Nothing in the present case warrants imposing a different standard on Vermont.

C. Vermont's Contribution Limits Are Entitled To Deference And Are Not Significantly Different Than Other States' Limits That Have Been Upheld By The Courts.

The petitioners' further argument that Vermont's limits are unconstitutional because they would arguably be equally effective at higher levels is likewise unfounded. This Court explicitly rejected this argument in *Buckley*, 424 U.S. at 30, pointing out that it was not the prerogative of the courts to fine-tune the determinations of the legislature. Such deference is entirely appropriate.

In determining the dollar amounts that will be most effective at preventing corruption and the appearance of corruption, while still permitting candidates to amass the resources necessary for effective advocacy, each State must consider its own unique circumstances and needs. In States in which electoral districts cover small geographic areas or have few constituents, it may be possible for candidates to communicate with voters through relatively inexpensive means, such as by going door-to-door and distributing leaflets. In States where electoral districts are larger, television advertising and other, more expensive methods of communication may be required.

The wide variation among States in the costs of campaigning is borne out by figures compiled by The Institute on Money in State Politics documenting the average amounts raised by state legislative candidates in

the 2004 general elections. The Institute on Money in State Politics, *State Elections Overview 2004*, p. 4 (Dec. 2005) (available at www.followthemoney.org/press/Reports/200601041.pdf). Whereas the average raised by state house candidates in California was $403,456, it was only $539 in New Hampshire. *Id.* Similarly, the average raised in state senate campaigns ranged from a high of $555,196 in California to a low of $3,747 in North Dakota. *Id.*[5] Myriad other factors, such as the income level of the State's inhabitants and their pattern of past contributions, may also factor into a State's determination of the most appropriate limits. In each case, the state legislature is far better positioned than the judiciary to weigh these factors and determine what dollar limit will best serve the State's needs.

Significantly, Vermont's contribution limits are not notably different from other States' limits that the courts have upheld. In *Montana Right to Life Association v. Eddleman*, 343 F.3d 1085 (9th Cir. 2003), *cert. denied*, 543 U.S. 812 (2004), the Ninth Circuit upheld a Montana statute limiting contributions to candidates for governor and lieutenant governor to $400, contributions to all other candidates for statewide office to $200, and contributions to candidates for any other public office to $100. Although the court acknowledged that these limits were "some of the lowest in the country," *id.* at 1095, it nonetheless concluded that they did not prevent Montana candidates from running effective campaigns.

Similarly, in *Daggett v. Commission on Government Ethic and Elections*, 205 F.3d 445 (1st Cir.

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[5] Significantly, the costs of campaigning in Vermont are very low compared to those of other States. The average amount raised by state house candidates in Vermont ($2883) was less than in all other States except New Hampshire and Wyoming, and the average amount raised by Vermont state senate candidates ($12,463) was lower than in all but three States, Montana, North Dakota and Wyoming. *Id.*

2000), the First Circuit upheld a Maine statute imposing per election limits of $500 on contributions to gubernatorial candidates and $250 on contributions to all other candidates. In *Minnesota Citizens Concerned v. Kelley*, 427 F.3d 1106 (8th Cir. 2005), the Eighth Circuit upheld Minnesota's $500 limit on contributions to legislative candidates and in *Florida Right to Life, Inc. v. Mortham*, No. 6:98-770-CV.ORL-19A, 2000 WL 33733256 (Mar. 20, 2000), the court upheld Florida's $500 limit on contributions to any state candidate.[6]

In short, Vermont's limits are not significantly different from those upheld in other States, including States such as Florida where the population is much greater than in Vermont[7] and the costs of campaigning are dramatically higher. *See* The Institute on Money in State Politics, *State Elections Overview 2004*, p. 4 (Dec. 2005)(noting that the average amount raised by Florida house candidates for the 2004 general election was $97,219, compared with $2,883 in Vermont). If this Court were to conclude, contrary to the Second Circuit's ruling, that Vermont's limits did not pass constitutional muster, the constitutionality of all of these other States' limits might be called into question. Because the petitioners have articulated no good reason to reach such a result, this Court should affirm the constitutionality of Vermont's limits and thereby ensure the continued ability of all States to utilize contribution limits in their on-going battle to protect the integrity of their electoral processes and restore the public's faith in democracy.

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[6] The contribution limits at issue in these cases – in Montana, Maine, Minnesota and Florida -- were per election, with the exception of Minnesota's limit, which was per election year. In non-election years, Minnesota's limit for contributions to legislative candidates drops to $100. Minn. Stat. § 10A.27.

[7] Florida's population exceeds 17 million, whereas Vermont's population is less than 700,000. U.S. Census Bureau, http://quickfacts.census.gov/qfd/index.htm.

CONCLUSION

The judgment of the Second Circuit should be affirmed.

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v.

WILLIAM H. SORRELL, *et al.*,

Respondents.

VERMONT REPUBLICAN STATE COMMITTEE, *et al.*,

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICI CURIAE* OF CURRENT AND FORMER STATE COURT JUSTICES AND JUDGES IN SUPPORT OF WILLIAM H. SORRELL, *et al.*

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES.....iii

INTERESTS OF THE *AMICI CURIAE*.....1

SUMMARY OF ARGUMENT.....2

ARGUMENT.....3

I. *Buckley* Should Not Be Read To Ban Generous Spending Limits in Judicial Campaigns.....3

A. *Buckley* Addressed Only the Very Low Spending Limits Imposed by FECA.....4

B. *Buckley* Did Not Consider the Full Range of State Interests That Could Be Proffered To Justify Generous Expenditure Caps.....6

II. *Buckley* Should Be Reconsidered If It Imposes a Ban on Mandatory Spending Limits That Reaches Not Only Executive and Legislative Races But Also Campaigns for the Bench.....9

A. The Link Between Money and Speech Weakens as Campaign Expenditures Rise Above a Generous Level.....10

B. Spiraling Expenditures May Reflect a Prisoner's Dilemma, Rather Than Fully Voluntary Spending in Need of Protection.....13

Page

C. This Court Should Not Reach Out to Preclude States from Combating the Harms Associated with Uncontrolled Judicial Campaign Spending.....20

CONCLUSION.....23

APPENDIX A.....A-1

TABLE OF AUTHORITIES

Page

Cases

Agostini v. Felton,
521 U.S. 203 (1997).....9

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835 N.E.2d 801 (Ill. 2005).....17

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459 U.S. 197 (1982).....7

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295 U.S. 602 (1935).....3–4

Kastigar v. United States,
406 U.S. 441 (1972).....3

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511 U.S. 375 (1994).....3

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142 F.3d 907, 913-18 (6th Cir. 1998).....2

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Page

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118 F. Supp. 2d 459 (D. Vt. 2000).....7, 19

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536 U.S. 765 (2002).....22

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149 F.3d 523 (6th Cir. 1999).....19

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Page

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Page

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Deborah Goldberg, *et al.*, *The New Politics of Judicial Elections 2002: How the Threat to Fair and Impartial Courts Spread to More States in 2002,* 19 (Justice at Stake 2004).....20

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Page

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Page

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With the consent of the parties, *Amici Curiae* hereby submit their brief in support of William Sorrell, *et al.*, Respondents/Cross Petitioners in these cases.[1]

INTERESTS OF THE *AMICI CURIAE*

Amici Curiae are current and former state court justices and judges, who are deeply concerned about the growing influence of special interest money on judicial campaigns.[2] Most of the *Amici* have personal experience as candidates in judicial elections, and all of them deplore the disturbing trends increasingly coming to national attention. *Amici* do not necessarily support spending limits in any particular campaigns, but they believe that sovereign states should have the power to protect their elected judiciaries from the corrosive effects of uncontrolled spending by imposing generous limits on expenditures by candidates for the bench. *Amici* recognize that the instant case does not pertain directly to judicial campaigns, but a ruling that *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), constitutes an absolute bar to mandatory spending limits will directly impair their interests in protecting the integrity, impartiality, and independence of the bench, both real and perceived. *Amici* therefore urge this Court not to accept that excessively expansive reading of *Buckley*, or, if that reading cannot be avoided, to revisit *Buckley*'s ruling in light of the arguments presented here.

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[1] We have been informed that the Attorney General of Vermont has filed a letter with the Clerk of this Court, consenting to the filing of all *amicus* briefs. Letters from counsel for all other parties, consenting specifically to the filing of this brief, have been filed with the Clerk of this Court by counsel for *Amici*. No party's counsel authored any part of this brief. No person or entity other than *Amici* and their counsel contributed monetarily to preparing or submitting the brief.

[2] A complete list of the *Amici Curiae* is annexed as an Appendix to this brief.

SUMMARY OF ARGUMENT

Amici acknowledge that several courts have read language in *Buckley* to outlaw all campaign expenditure ceilings. *See Kruse v. City of Cincinnati*, 142 F.3d 907, 913-18 (6th Cir. 1998) (rejecting spending limits because interests advanced in their defense were rejected as constitutionally insufficient in *Buckley*). It is neither necessary nor appropriate, however, to read *Buckley* as an absolute ban on all mandatory limits on campaign spending. It is a mistake to read the language of any judicial opinion—including that of *Buckley*—as a theoretical pronouncement divorced from the fact pattern and statutory scheme that was actually before the Court.

Because the Federal Election Campaign Act ("FECA") at issue in *Buckley* imposed very low expenditure ceilings, and the *Buckley* Court evaluated only three state interests offered to justify those caps, this Court should not read *Buckley* to impose a *per se* ban on spending limits. Specifically, because FECA governs only federal candidates, *Buckley* did not present the issue whether expenditure caps applicable to judicial candidates might be justified by interests unique to the judiciary. This Court thus should not read *Buckley* to foreclose generous spending limits in campaigns for the bench. Point I.

If this Court concludes that *Buckley* categorically precludes all spending limits, then *Buckley* should be revisited. The decision in *Buckley* rests on the questionable premises that limits on spending invariably impose a severe burden on campaign speech and that contribution limits are adequate to combat real and perceived corruption. But above generous levels allowing for vigorous debate of the issues, the declining marginal utility of campaign spending means that each new dollar adds little new communicative value. Moreover, there is reason—including evidence from recent

judicial elections—to conclude that candidates are not eager to spend without limit but are instead trapped in a form of prisoner's dilemma that only generous spending limits can resolve. Without those limits, candidates must endlessly escalate the fundraising arms race, even if it means accepting contributions that taint their integrity and present opportunities for abuse. *Buckley* falls when these false premises are rejected. Point II(A)-(B).

Even if this Court does not reject *Buckley*'s tenuous assumptions, the opinion in these consolidated cases should be crafted with restraint. This Court should not permit its opinion to foreclose spending limits in judicial elections, which are not at issue in this case and the constitutionality of which has never been briefed to this Court. Whether such limits can be factually supported and legally justified is a question for another day. Point II(C).

ARGUMENT

I. *Buckley* Should Not Be Read To Ban Generous Spending Limits in Judicial Campaigns.

A judicial opinion is not a statute enacted to address broad and widely shared policy concerns. A court's opinion is a reasoned explanation for the resolution of a particular case or controversy. When explanatory language in an opinion appears to describe a rule far broader than necessary to resolve the particular case before the Court, the language is entitled to respect as the Court's considered *dictum*, but it is not controlling in different factual and legal settings. *E.g.*, *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 379 (1994) ("It is to the holdings of our cases, rather than their dicta, that we must attend."); *Kastigar v. United States*, 406 U.S. 441, 454-55 (1972) ("[B]road language" that is unnecessary to a decision "cannot be considered binding authority."); *Humphrey's Ex'r v. United States*, 295 U.S.